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No. 03-923

IN THE

Supreme Court of the United States

STATE OF ILLINOIS,

Petitioner,

v.

ROY I. CABALLES,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has filed *amicus curiae* briefs in this Court in many cases involving the Fourth Amendment. See *Bond* v. *United States*, 529 U.S. 334 (2000); *Kyllo* v. *United States*, 533 U.S. 27 (2001); *Thornton* v. *United States*, 124 S. Ct. 2127 (2004).

SUMMARY OF THE ARGUMENT

The Supreme Court of Illinois correctly held that the Fourth Amendment requires that law enforcement officers have reasonable suspicion that a vehicle contains contraband before using a drug-detection dog to sniff the vehicle during a routine traffic stop. This is true for four reasons. *First*,

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

suspicionless dog sniffs are not reasonably related in scope to the circumstances that justified the initial stop, when the right of motorists to remain free from arbitrary police interference is balanced against the public interests advanced by the seizure. Such suspicionless sniffs prolong the length and increase the intrusiveness of seizures, without contributing substantially to the interdiction of contraband. In addition, suspicionless sniffs allow unfettered police discretion and present the risk of involuntary consents. *Second*, requiring reasonable suspicion will reduce the incidence of false positives, a significant problem with drug-detection dogs that results in intrusions upon motorists' Fourth Amendment rights. *Third*, requiring reasonable suspicion is consistent with this Court's precedents. *Fourth*, petitioner and its *amici* are wrong in arguing that suspicionless dog sniffs are justified where police have probable cause to make the traffic stop.

ARGUMENT

CONDUCTING A SUSPICIONLESS DOG-SNIFF IMPERMISSIBLY EXPANDS A ROUTINE TRAFFIC STOP INTO A NARCOTICS INVESTIGATION IN VIOLATION OF THE FOURTH AMENDMENT.

The Fourth Amendment ensures "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. A motorist is "seized" within the meaning of the Fourth Amendment during a routine traffic stop. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Whren* v. *United States*, 517 U.S. 806, 809-10 (1996). To be reasonable, such a seizure must be "'justified at its inception.'" *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968)). A traffic stop is not justified unless the police have an objectively valid suspicion that a violation has occurred. *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979). Suspicionless

stops of motorists are forbidden. *Id.*; *Brignoni-Ponce*, 422 U.S. at 884.

In this case it is undisputed that the initial decision to pull over respondent was justified. Nevertheless, a traffic stop that is initially justified must remain "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Sharpe*, 470 U.S. at 682 (quoting *Terry*, 392 U.S. at 20). Reasonableness requires balancing the motorist's right to remain free from arbitrary police interference against the public interests advanced by the seizure. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam); *Brignoni-Ponce*, 422 U.S. at 878.

In striking the proper balance, it is important to recognize that Fourth Amendment liberties "belong in the catalog of indispensable freedoms," for "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). At the same time, the public interest always weighs against this freedom because the exigencies of law enforcement "stand in constant tension with the [rights protected by the Fourth Amendment.]" *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 (1973). The resultant tension counsels "a resolute loyalty to constitutional safeguards." *Id.*

Loyalty to the safeguards of the Fourth Amendment demands the result reached below. Suspicionless dog-sniffs are arbitrary exercises of police authority, which are anathema to a free society. The Illinois Supreme Court recognized as much, and demanded that there be "specific and articulable facts" giving rise to reasonable suspicion before the police conduct a dog-sniff during a routine traffic stop. *People* v. *Caballes*, 802 N.E.2d 202, 204-05 (Ill. 2003) (internal quotation marks omitted) (quoting *People* v. *Cox*, 782 N.E.2d 275, 281 (Ill. 2002)). This decision was correct and should be affirmed by this Court.

Make no doubt about it: What law enforcement seeks in this case is an absolute and unfettered right to conduct drug dog sniffs whenever and wherever, solely at the whim of the officer in the field, with the resulting ignominy of mostly innocent motorists being targeted like common drug couriers. See *Brown* v. *Texas*, 443 U.S. 47 (1979):

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979); *United States* v. *Brignoni-Ponce*, *supra*, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, *supra*, at 663. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976).

Id. at 51. By this standard, the decision of the Supreme Court of Illinois must be affirmed.

A. Suspicionless Dog-Sniffs At Traffic Stops Would Work A Severe Intrusion Upon The Fourth Amendment Freedoms Of Millions Of Motorists.

This case implicates the rights of all motorists to remain free from arbitrary police interference, a right that is at the core of the Fourth Amendment. See *United States* v. *Ortiz*, 422 U.S. 891, 895 (1975). The gravity of this threat can only be understood when viewed in light of the massive numbers of traffic stops conducted each year. Data collection efforts regarding traffic stops are growing, but national data is not currently available. See U.S. Dep't of Justice, *Fact Sheet: Traffic Stop Data Collection Policies for State Police, 2001*,

(Dec. 2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/tsdcp01.pdf. Missouri, however, has compiled and published statistics regarding traffic stops since early 2000. See Mo. Att'y Gen.'s Office, *2002 Annual Report Missouri Traffic Stops* (2003) ("*2002 Mo. Att'y Gen. Annual Rep.*"), *available at* http://www.ago.state.mo.us/racialprofiling/2002/racialprofiling2002.htm. The results of the Missouri study reveal that millions of traffic stops occur in that state each year, and that hundreds of thousands happen every day.[2] Thus, the rule adopted in this case will likely affect every motorist on America's streets and highways.

1. The vast majority of traffic stops involve law-abiding citizens, and result in, at most, a citation.[3] Allowing the police to conduct suspicionless dog-sniffs will inevitably result in prolonging the length and increasing the intrusiveness of seizures experienced by millions of motorists.[4] What is more, this practice is extremely unlikely to aid in stopping the flow of illegal narcotics, for traffic stops only rarely result in the interdiction of contraband.[5]

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[2] Missouri reported 1,369,185 traffic stops in 2002. *2002 Mo. Att'y Gen. Annual Rep.* tbl.1. That year the Missouri and United States populations were estimated to be 5,673,000 and 290,116,000. U.S. Census Bureau, *Statistical Abstract of the United States* tbls.3, 17 (2003), *available at* http://www.census.gov/prod/2004pubs/03statab/pop.pdf. If traffic stops are proportional to population, roughly 70 million traffic stops were made in the United States in 2002, or about 200,000 per day.

[3] For example, of Missouri's 1,369,185 traffic stops in 2002, approximately 93.2 percent did not result in arrest. *2002 Mo. Att'y Gen. Annual Rep.* tbl.1.

[4] Given 1,369,185 traffic stops, 108,539 searches and a 21 percent hit rate, *see infra* n.5, over 85,000 innocent motorists were stopped and searched in Missouri in a single year. *See 2002 Mo. Att'y Gen. Annual Rep.* tbl.1.

[5] In Missouri, eight percent of vehicles stopped in 2002 were searched. *Id.* Of that group, the hit rate for finding contraband was only 21 percent.

Suspicionless sniffs are thus both overbroad and not justified by law enforcement objectives.

Precisely the reverse is true of sniffs based on reasonable suspicion. The decision below limits the use of drug-detecting dogs to those situations where the police have objective suspicion of criminal (*i.e.*, narcotics) activity. This standard protects otherwise innocent motorists from the significant additional intrusion presented by the canine unit. At the same time, this standard serves to increase the ratio of "hits" to "sniffs," making the canine unit a more efficient weapon in the effort to curb narcotics trafficking.

In contrast, the rule sought by petitioner would eviscerate this protection and efficiency, by creating an extremely broad police entitlement. See *People* v. *Cox*, 782 N.E.2d 275, 281 (Ill. 2002) (permitting suspicionless sniffs would allow "police officers . . . to [use] canine units at every traffic stop"), *cert. denied*, 539 U.S. 937 (2003). Indeed, the behavior of the police in this case illustrates the extent to which law enforcement officials already believe they are entitled to use drug-dogs whenever they choose. Trooper Graham decided to respond with his dog immediately after Trooper Gillette notified dispatch of his intent to pull over respondent, *i.e.* before the stop was even completed. The presence of the canine unit was not requested by Officer Gillette, nor was there reason to believe that respondent was transporting contraband. Other cases reflect the same view. *E.g.*, *State* v. *Davalos*, 128 S.W.3d 143, 146 (Mo. Ct. App. 2004) (after issuing a citation for crossing the center line, police officer informed the driver that he was free to leave, but that his vehicle would be detained until a canine unit arrived because he seemed nervous); *State* v. *Fields*, 662 N.W.2d 242, 244 (N.D. 2003) (police officer summoned a canine unit to the scene of a traffic stop *after* issuing a

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Id. This means that less than two percent of the traffic stops in Missouri resulted in the seizure of contraband.

citation, saying good-bye and returning to his cruiser). These exercises of police authority cannot be reconciled with the Fourth Amendment.

The police may constitutionally stop any motorist who has violated even a technical traffic regulation, *Whren*, 517 U.S. at 819, choose to arrest the motorist, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), and even search the stopped car incident to that arrest, *Thornton*, 124 S. Ct. at 2129. Even these firmly established rules, however, should not be viewed as law enforcement entitlements. Rather they are exceptions to the warrant and probable cause requirements that are at the foundation of the Fourth Amendment. See *id.* at 2133 (O'Connor, J., concurring).

Where the police choose not to arrest, and instead decide to issue a citation, their power over the motorist is diminished. *E.g.*, *Knowles* v. *Iowa*, 525 U.S. 113 (1998) (suspicionless search of a car during a citation stop was unconstitutional even though the police could have conducted the same search had they arrested the driver). To be sure, a citation stop carries with it certain investigatory powers. The police officer may take reasonable precautions to assure his or her safety, or the safety of others at the scene. See *Mimms*, 434 U.S. at 111; *Maryland* v. *Wilson*, 519 U.S. 408, 415 (1997). The officer may examine the motorist's license and registration, check for outstanding warrants, and make inquiries about destination, travel plans, etc. See *United States* v. *Jones*, 269 F.3d 919, 924 (8th Cir. 2001). But this investigative authority is limited, and "[i]f no further suspicion is aroused in the officer following these inquiries, the traffic stop should go no further." *Cox*, 782 N.E.2d at 279. If the Fourth Amendment is to have any meaning, further intrusions should be justified by an objective suspicion. The law enforcement entitlement that would otherwise result presents too grave a threat of unbridled police discretion.

This sort of discretion vitiates the guarantees of the Fourth Amendment. *Brignoni-Ponce*, 422 U.S. at 882 ("the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion"); *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting) ("to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision . . . and leaves police discretion utterly without limits"). Limiting police discretion *at the stop* is critical, because the decision *to initiate the stop* will nearly always be insulated from review. A stop may be initiated whenever probable cause exists to suspect violation of any traffic law, regardless of the subjective motivation involved. *Whren*, 517 U.S. at 819. Such probable cause is a low hurdle: it is a rare driver who can avoid running afoul of the intricate web of traffic regulations. The police have nearly unfettered discretion to decide which cars should be stopped. They therefore should not have similar discretion to decide which car will be sniffed and which driver will be sent on unmolested. Such unfettered discretion would necessarily exacerbate the disparate treatment received by certain groups of drivers. The evidence of "racial profiling" is mounting. See generally U.S. Dep't of Justice, *Fact Sheet: Traffic Stop Data Collection, supra*; Racial Profiling Data Collection Res. Ctr., Northeastern Univ., Library and Archives, Data Collection Reports, *available at* http://www.racialprofilinganalysis.neu.edu (last visited Sep. 17, 2004) (collecting available data demonstrating the existence of racial profiling); see also *2002 Mo. Att'y Gen. Annual Rep.* § II (in 2002 "African Americans were stopped at a rate 32 percent higher than expected based solely on their proportion of the population" in Missouri). Controlling the discretion of the officer once the stop has been made may well be the most effective way to address this problem.

Unfettered police discretion to conduct a dog-sniff also vitiates the ability of a motorist to withhold consent to a

search. Police officers frequently call drug-dog units to the scene of a traffic stop, without any reason to suspect drug-related wrongdoing. They then offer to cancel the call if the driver consents to a search in the hope of returning to the road faster. *E.g.*, *State* v. *Nikolsky*, No. 3-926/02-1813, 2004 Iowa App. LEXIS 131, at *12 (Iowa Ct. App. Jan. 28, 2004) (police officer "told defendant that if he were in defendant's shoes, he would let officers search his car" to avoid the wait for the drug dog); see also *Palmer* v. *State*, 572 S.E.2d 27, 29 (Ga. Ct. App. 2002) (defendant consented to search after he was told that a canine unit would be summoned if he refused). Indeed, one jurisdiction has elevated this practice to standard operating procedure. See *United States* v. *Holloman*, 113 F.3d 192, 193 (11th Cir. 1997) (per curiam) (describing the St. Petersburg, Florida practice of stopping motorists and asking for consent, and where consent is refused, calling in a canine unit).

Obviously, this presents the very real possibility of coerced consent. Most motorists are predominantly concerned with returning to the road. Most motorists have committed no other offense than speeding, not having one's seatbelt on, or having a license plate light out. A rational driver might well consent to a search simply to avoid the additional delay of waiting for a dog-sniff. Indeed, at least one lower court declared that consent given in such a situation is meaningless. See *Rouse* v. *State*, 643 So. 2d 696, 698 (Fla. Dist. Ct. App. 1994). Prohibiting the suspicionless sniffs will do much to prevent the risk of involuntary consent. It would also provide both police and motorists with a bright line rule, avoiding difficult inquiries into the validity of consent and the line drawing problems inherent in deciding how much of a delay is acceptable. Cf. *New York* v. *Belton*, 453 U.S. 454, 459-60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.")

B. Requiring Reasonable Suspicion Will Reduce The Incidence Of False Positives And The Attendant Fourth Amendment Consequences.

Drug-detecting dogs are hardly infallible, and false-positive dog-sniffs are inevitable. *E.g.*, *Laime* v. *State*, 60 S.W.3d 464, 476 (Ark. 2001) (noting that a certified drug-dog had likely alerted in error between 10 and 50 times); *United States* v. *Scarborough*, 128 F.3d 1373, 1378 n.3 (10th Cir. 1997) (describing a dog that alerted falsely four out of nineteen times); *United States* v. *Limares*, 269 F.3d 794, 797 (7th Cir. 2001) (accepting as reliable a dog with a 62 percent accuracy record). Some of the erroneous positives are likely due to the unfortunate fact that nearly all U.S. currency has become contaminated by drug residue while in the hands of the Federal Reserve Bank. See *United States* v. *$242,484.00*, 351 F.3d 499, 511 (11th Cir. 2003) (noting that drug dogs will alert to approximately 80 percent of U.S. currency), *vacated on other grounds on grant of reh'g en banc*, 357 F.3d 1225 (11th Cir. 2004); *United States* v. *$506,231.00 in United States Currency*, 125 F.3d 442, 453 (7th Cir. 1997) (as much as 96 percent of U.S. currency is contaminated with cocaine); *Muhammed* v. *DEA, Asset Forfeiture Unit*, 92 F.3d 648, 653 (8th Cir. 1996) ("an extremely high percentage of all cash in circulation in America today is contaminated with drug-residue"); *United States* v. *$5,000 in U.S. Currency*, 40 F.3d 846, 849-50 (6th Cir. 1994) (a dog alert is of "minimal" value because as much as 97 percent of U.S. currency is "'thoroughly corrupted'" by cocaine residue). Regardless of the cause, however, it is an undeniable fact that drug-dogs will frequently alert to currency or other "dead scents."

False positives also abound in other circumstances. Drug-dogs have proven to be especially inaccurate in the school setting. See, *e.g.*, *Doe* v. *Renfrow*, 631 F.2d 91, 91-92 (7th Cir. 1980) (per curiam), and *id.* at 95 (Fairchild, J., dissenting) (out of 50 drug dog alerts during a day long sweep of a high school/junior high complex, 35 were in error—four

of the false alerts resulted in fruitless strip searches of students as young as 13); Ray Parker, *School board's drug-sniffing dog policy questioned*, Naples Daily News, July 5, 2004 (search of a high school senior's car after a drug-dog alert revealed no narcotics, but did reveal her mother's stun-gun, resulting in her expulsion). There is no reason to expect better performance at the side of a highway. Even the best drug-detecting dogs have been known to alert to food, other animals, and even subconscious (or deliberate) cues from their handlers. See generally, Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 424 (1997).

The significance of the false positive problem is exacerbated by the fact that a drug-dog alert is generally sufficient to serve as the basis for issuing a warrant, or where appropriate provide probable cause to conduct a warrantless search. See, *e.g.*, *United States* v. *Duffaut*, 314 F.3d 203, 208 (5th Cir. 2002); *United States* v. *Sundby*, 186 F.3d 873, 876 (8th Cir. 1999). A single false positive thus carries with it many other costs to innocent individuals and will result in further intrusions upon Fourth Amendment liberties. *E.g.*, *Renfrow*, 631 F.2d 92-93. Moreover, there is no remedy. A false positive will reveal no evidence, so the exclusionary rule cannot apply. At the same time, the doctrine of qualified immunity will bar most, if not all, civil suits. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). To be sure, law enforcement agencies have taken steps to minimize the risk of false positives. The dogs are specially bred. They receive extensive training, as do their handlers. Over the run of cases, however, even a near-perfect dog will cause a number of serious intrusions on the rights of innocent individuals.

A requirement of reasonable suspicion would greatly reduce the number and severity of false positives. If the police are entitled to use drug-dogs whenever and wherever they choose, then all motorists, regardless of the likelihood that they are involved in narcotics trafficking, are equally

likely to find themselves subjected to a dog-sniff. It is reasonable to assume that the percentage of drivers who actually are transporting drugs is very small. In these circumstances even a very accurate dog will falsely alert many times. See Bird, *supra*, at 430-31. Basic principles of conditional probability dictate, however, that if the likelihood of wrongdoing among the population sniffed is raised, the number of false positives will be reduced by an order of magnitude. See *id.* Thus, if the police only use dogs to sniff those for whom there already exists reasonable suspicion, that reduction can be realized.

C. Requiring Reasonable Suspicion Is Consistent With This Court's Prior Precedents.

Despite the broad nature of the law enforcement authority at stake here, and the attendant risks of involuntary consents and false positives, petitioner and its supporting *amici* argue that the Fourth Amendment intrusions caused by suspicionless dog-sniffs are *de minimis*. In support they point to three areas of this Court's Fourth Amendment jurisprudence. First, they argue that because a dog-sniff is not an independent *search* within the meaning of the Fourth Amendment, it cannot unreasonably expand a *seizure*. Pet Br. at 6-8; U.S. Br. at 10-11; Ark. Br. at 14. Second, they argue that dog-sniffs should be considered non-events for Fourth Amendment purposes, like questioning of suspects, or observations of items in plain-view. Pet Br. at 8-9; U.S. Br. at 18-19; Ark. Br. at 14-16. Finally, the United States also argues that privacy expectations in automobiles are so far reduced that motorists cannot have a reasonable expectation to not be exposed to dog-sniffs. U.S. Br. at 11-12. None of these arguments is persuasive, and each reflects an overly restrictive understanding of Fourth Amendment protections.

First, the dog-sniff precedents on which petitioner relies are inapposite. While a dog-sniff is not a search, *United States* v. *Place*, 462 U.S. 696, 707 (1983), the court below did not so hold. It held only that a suspicionless dog-sniff unreasonably

expands the scope of an otherwise lawful seizure. *Caballes*, 802 N.E.2d at 205. Similarly, the fact that a dog-sniff does not turn a checkpoint seizure into a search, *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 40 (2000), says nothing about the reasonableness of the seizure in this case. The Illinois Supreme Court did not discuss this line of cases simply because they are not germane to its decision.

And, if it sanctions a suspicionless drug dog sniff on the side of the road, where does this Court draw the line as to how much time is reasonable for the dog to arrive? Five minutes, ten, twenty, thirty, an hour? The petitioner's and its *amici*'s argument flies in the face of a bright-line rule that is easy for the officer in the field to apply.

Second, the plain-view doctrine is even less applicable. This doctrine provides that the Fourth Amendment does not require police officers "to shield their eyes." *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986). Nor should they have to ignore their own sense of smell. *E.g.*, *United States* v. *Sharpe*, 470 U.S. 675 (1985) (DEA agent properly opened locked trailer after noting a strong smell of marijuana). But the significant difference between an officer's own sense of smell and that of a drug-dog cannot be ignored. But the distinction is constitutionally significant between, on the one hand, an officer's use of his or her "plain" senses in the brief exchanges attendant to a traffic stop and, on the other hand, an expansion of a seizure to encompass a dog sniff or other investigatory effort. The former does not expand the scope of the seizure. The latter does in that it fundamentally changes both the purpose and the method of the "look and see" during a traffic stop. A trained canine's sense of smell is many orders of magnitude more powerful than that of any police officer. See Bird, *supra*, at 408 (noting that olfactory prowess is proportional to the number of receptor cells an organism possesses and that a dog's receptor cells can "cover a space the area of the skin on the dog's body" while "the surface area of human olfactory cells would cover no more than a postage

stamp.") (citing Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 Hastings L.J. 15, 20-42 (1990)).

Moreover, the reason that plain-view observations, and similar police investigative methods, do not impermissibly expand a traffic stop is that they fall within a class of actions that are essentially non-events for the purposes of the Fourth Amendment. They are actions that the police may undertake at any time and against any person. Including dog-sniffs in this class would be unreasonable. The Fourth Amendment forbids the use of "unnecessarily frightening or offensive methods of . . . investigation." *Ortiz*, 422 U.S. at 895. Trained police canines are a particularly intimidating display of authority and their presence inevitably increases the embarrassment, offense and fright experienced by motorists. Moreover, analogizing dog-sniffs to questioning of suspects and observations made via plain-view would extend their use far beyond citation stops. The police would be able to conduct dog-sniffs of any property (or person) at any time and would be able to use this particularly frightening method of investigation without any showing of necessity.

The United States also emphasizes that there is a lowered expectation of privacy in automobiles. U.S. Br. at 11-12. While "[t]he Fourth Amendment does not treat a motorist's car as his castle," *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004), it still functions to protect motorists' rights during a citation stop. *Knowles*, 525 U.S. at 116-18. The government's understanding of the so-called automobile exception, however, would allow it to swallow the rule and would take an unduly "long step today toward 'balancing' into oblivion the protections [of] the Fourth Amendment." *Michigan* v. *Long*, 463 U.S. 1032, 1065 (1983) (Brennan, J., dissenting).

The so-called "automobile exception" was first announced in *Carroll* v. *United States*, 267 U.S. 132 (1925), where this Court crafted an exception to the warrant requirement for

searches of automobiles in situations where law enforcement officers have probable cause to believe there is contraband in the car, *id.* at 153. Over the ensuing decades, the *Carroll* exception has been greatly expanded. Where probable cause exists, the police may search not only the car, but containers therein. *United States* v. *Ross*, 456 U.S. 798 (1982). This includes containers that belong to passengers or third-parties. *Wyoming* v. *Houghton*, 526 U.S. 295 (1999). The *Carroll* exception has spilled over to broaden other exceptions to the warrant requirement of the Fourth Amendment. For example, the right of the police to conduct a warrantless search of a person incident to an arrest has been extended to include the interior of a car, *Belton*, 453 U.S. at 460, whether or not the driver is arrested in the vehicle, *Thornton*, 124 S. Ct. at 2131. The United States would have the Court take the additional step of allowing suspicionless dog-sniffs at any traffic stop.

This additional step would be ill-advised and tragically ironic. The decision that first lowered the expectation of privacy in automobiles contained its own limitation:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is . . . probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Carroll, 267 U.S. at 153-54. Change "stop" to "detain" and "probable cause" to "reasonable suspicion" and add "unnecessary" before "interruption," and that is the holding below that should be affirmed.

To this day the police may not search a car for contraband absent probable cause or an arrest. A dog-sniff may not be a search, but it differs only in degree, not in kind. Because a

dog-sniff presents a lesser degree of intrusiveness than a search, probable cause is not required. Nevertheless, because a dog-sniff is more intrusive than a question or direct observation, some objective form of justification is needed, or the intolerable result foreshadowed in *Carroll* will have come to pass. The middle ground is the well-known requirement of reasonable suspicion that was originally announced in *Terry*.

D. Probable Cause To Make A Traffic Stop In No Way Justifies The Use Of Suspicionless Sniffs.

The traffic stop at issue here, like most, was based on probable cause. Petitioner and *amici* therefore insist that the presence of probable cause entitles the police to enlist the assistance of drug-detecting dogs, no matter the risk or the cost. Pet Br. at 12, 15; U.S. Br. at 16-17; Ark. Br. at 12-13. They contend that the reasonable relation requirement of *Terry* is inapplicable to probable cause traffic stops. Because probable cause is the "'gold standard'" of police justifications, a traffic stop supported by probable cause will be reasonable in nearly all circumstances. U.S. Br. at 17; Ark. Br. at 13. Thus, they contend that there is no need to balance the interests of the individual against those of society because the result is preordained. This argument makes a series of fatal errors.

1. The distinction between traffic stops supported by probable cause and those based on only reasonable suspicion is illusory at best—the latter category is largely empty. As the Florida Supreme Court once noted, traffic regulations are so comprehensive that "it is difficult to operate a vehicle without committing some trivial violation." *Kehoe* v. *State*, 521 So. 2d 1094, 1097 (Fla. 1988); see also *United States* v. *Sugar*, 322 F. Supp. 2d 85, 92 (D. Mass. 2004) (noting that a "30-something" driver who had seen the police cruiser and was consciously trying to avoid committing a traffic infraction could not avoid doing so). Indeed, perfect compliance with traffic regulations is so difficult that some officers have argued that the act of conforming to all

applicable regulations should itself give rise to reasonable suspicion. *E.g.*, *United States* v. *Smith*, 799 F.2d 704, 707 (11th Cir. 1986). It is no wonder that almost all traffic stops occur after the police allegedly witness a violation of one ordinance or another. Which, of course, means that nearly all traffic stops are supported by alleged probable cause; a question that becomes essentially beyond judicial review contrary to *Richards* v. *Wisconsin*, 520 U.S. 385, 393 (1997).

It follows that if Fourth Amendment balancing is inappropriate for probable cause traffic stops, the balancing approach is inappropriate for all traffic stops. .

2. This Court's vehicle stop cases preclude that conclusion. As an initial matter, the Court has twice noted that a citation stop "is a relatively brief encounter and 'is more analogous to a so-called "*Terry* stop" . . . than to a formal arrest.'" *Knowles*, 525 U.S. at 117 (1998) (omission in original) (quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984)); see also *Prouse*, 440 U.S. at 654 ("the purpose of [a citation stop] is limited and the resulting detention quite brief"). More importantly, this Court has had at least six opportunities to determine what forms of police conduct are reasonable during a citation stop. In each case the police had probable cause to believe that a traffic violation had occurred. And in each case the Court employed a balancing test.

In *Berkemer*, the Court addressed whether the *Miranda* warnings applied to questions asked during a routine traffic stop. The Court first noted that the *Miranda* warnings did not apply to *Terry* stops, because they were brief detentions that were "reasonably related in scope" to their original justification. *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984) (internal quotation marks omitted). In holding that the warnings did not apply to traffic stops either, the Court expressly relied on the "similarly noncoercive aspect of ordinary traffic stops." *Id.* at 440. The implication is clear—the reasonable relation requirement imposed by the Fourth

Amendment on both types of stops suffices to protect the Fifth Amendment interests of the detainees.

Petitioner, however, would rely on the Court's footnote in *Berkemer* that "[it did] not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Id.* at 439 n.29. Petitioner contends that this language indicates that there is no reasonable relation requirement for traffic stops, thereby foreclosing the result reached below. Pet. Br. at 15. This is clearly wrong. The Court's footnote simply indicates that a police officer's authority during a *Terry* stop is more limited than it is during a traffic stop. This is hardly controversial. For example, it is settled law that the police may demand to see the driver's license and registration during a traffic stop. No such authority exists during a *Terry* stop, although the police may ask questions about the individual's identity. See *Hiibel* v. *Sixth Judicial Dist. Court*, 124 S. Ct. 2451, 2457 (2004) (upholding a statute requiring a *Terry* detainee to provide his name, but specifically noting that nothing requires the detainee to produce identification). This difference merely places a traffic stop somewhere between a true *Terry* stop and a custodial arrest, which is precisely what the Court meant when it said that a traffic stop was more analogous to the former. Nothing in the footnote or the differing levels of authority it described indicates that there is no requirement that a traffic stop supported by probable cause be reasonably related to its initial justification.

This understanding of the footnote is also compelled by the Court's decisions both before and after *Berkemer*. In *Mimms*, two police officers observed a motorist driving an automobile with expired license plates and pulled him over in order to issue a citation.[6] *Mimms*, 434 U.S. at 107. Once at the scene,

[6] Petitioner claims that *Mimms* involved only an investigatory stop and not a stop supported by probable cause. Pet. Br. at 14-15. This is clearly wrong, and for two reasons. First, the officers had observed a clear violation of the Pennsylvania traffic code. This is precisely the same level of justification that Trooper Gillette had when he stopped respondent, which the United States refers to as "a particularly clear form of probable cause." U.S. Br. at 14. Second, the Court subsequently and unambiguously indicated that *Mimms* was a traffic stop supported by probable cause. *See Wilson*, 519 U.S. at 414.

the officers ordered the driver out of the car. *Id.* In upholding the validity of that order, the Court held that the public interest at stake, officer safety, was of the highest importance and that the additional intrusion of the order was *de minimis* at most. *Id.* at 110-11. In other words, the Court used the *Terry* balancing test, the same test used below by the Supreme Court of Illinois.

More recently, in *Wilson*, the Court used the same balancing approach to extend the *Mimms* rule to the passengers of the stopped car. 519 U.S. at 411-14. The Court once again determined that the public interest in officer safety outweighed a *de minimis* intrusion on liberty. *Id.* at 414. The Court expressly noted that probable cause existed for the stop and proceeded to balance the relevant interests. *Id.*

In *Long*, 463 U.S. at 1035, two police deputies observed a car "travelling erratically and at excessive speed." They then witnessed the car swerve off the road and into a shallow ditch.[7] *Id.* During the course of the traffic investigation, the police saw a hunting knife in the car and decided to search the passenger compartment for weapons. *Id.* at 1036. The Court reasoned that the search of the car was permissible precisely because the police had objectively reasonable suspicion that there might be weapons. *Id.* at 1051. Thus, it was the presence of reasonable suspicion that justified going beyond

[7] While *Long* involved a single-car accident, and not a traffic stop, the officers there clearly had probable cause to believe a traffic violation had occurred. The Court acknowledged as much by noting that the officers could have arrested Long for speeding, but chose to issue a citation instead. 463 U.S. at 1035 n.1.

the scope of the initial encounter, not the fact that the police had probable cause to make an arrest.

In *United States* v. *Sharpe*, 470 U.S. 675 (1985), a DEA agent and a police officer witnessed two vehicles traveling more than 20 miles an hour over the speed limit. *Id.* at 677. While the Court noted that the DEA agent's decision to call in a state police officer was based on a desire to conduct an "'investigatory stop,'" *id.*, no seizure occurred until the law enforcement officials witnessed a much more serious violation of the traffic code than the minor infraction involved here. The Court explicitly followed *Terry* and determined that the resulting seizures were reasonably related to the purpose of the stop. *Id.* at 682-83. Thus, *Sharpe* is yet another instance where the Court found it proper to rest its holding on the principles of *Terry* despite the presence of probable cause.

Finally, in *Knowles*, just as here, a police officer observed a motorist speeding and made a traffic stop. 525 U.S. at 114. The Court explicitly noted the existence of probable cause. *Id.* at 116. The Court then balanced the "'legitimate and weighty'" public interests in officer safety and collecting evidence against the right to remain free from warrantless searches. *Id.* at 117. The Court concluded that a citation stop presents a much lesser safety threat than a custodial arrest. *Id.* More importantly, the Court noted that the state had no interest in collecting or preserving evidence of other crimes at a citation stop because "the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote." *Id.* at 118. The Court thus made clear that the state's interest in uncovering evidence of other crimes is not reasonably related to the probable cause that justified the traffic stop.

3. In arguing that a balancing approach is unnecessary, the United States relies primarily on *Whren* v. *United States*, 517 U.S. 806 (1996), where the Court held that a police officer's subjective intent is irrelevant when evaluating the

reasonableness of a traffic stop. This reliance is misplaced, for no one challenges the reasonableness of Trooper Gillette's decision to stop respondent. The only issue in this case is whether the subsequent dog-sniff rendered the otherwise permissible stop unreasonable. Not a single word in *Whren* addresses whether there are limits on what the police may do during a citation stop supported by probable cause. To be sure, the Court did hold that the fact that the stop was made by a plainclothes officer in an unmarked car did not render the stop unreasonable. *Id.* at 818. But this is best understood as approving the authority of the plainclothes officer to make the stop, for there was nothing unusual in the manner in which the stop was conducted.

Nevertheless, the government argues that *Whren* limited the situations in which a traffic stop based on probable cause could be unreasonable to situations involving the use of deadly force or the penetration of the body. U.S. Br. at 13. Certainly this proves too much. If the balancing approach is limited to such exceptional circumstances, the police will have carte blanche to conduct the seizure as they see fit, provided they do not conduct a full-field search. This is not a reasonable result, because it fails to ensure that the seizure properly balances the public and individual interests.

This reading of *Whren* also conflicts with the cases discussed above. In *Knowles*, *Wilson*, *Long*, *Mimms*, and *Berkemer* the Court adopted a balancing approach despite the existence of probable cause. The better reading of *Whren* is that there is no need to engage in a balancing test to determine whether a particular seizure was justified at its inception when it is supported by probable cause. The scope of the seizure remains subject to the Fourth Amendment's reasonableness requirement, however, which requires a balancing approach. Here the outcome is clear. The intimidation and embarrassment caused by a dog-sniff, as well as the unfettered discretion and risk of involuntary

consents, clearly outweigh the "remote" chance that the police will obtain evidence of other crimes.

CONCLUSION

For all these reasons, the decision of the Supreme Court of Illinois should be affirmed.

Respectfully Submitted.

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